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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ADOPTION OF AN ORDINANCE ESTABLISHING A FIXED BUFFER ZONE RELATING TO HEALTH CARE FACILITIES, PLACES OF WORSHIP AND SCHOOL GROUNDS

As you know, the Ninth Circuit Court of Appeals recently issued its opinion in Sabelko v. City of Phoenix, 97 Daily Journal D.A.R. 8990 (July 14, 1997), striking down a Phoenix, Arizona ordinance that created a floating buffer zone around persons entering or leaving health care facilities. This decision followed the United States Supreme Court's decision in Schenck v. Pro Choice Network of Western New York, -- U.S. --, 117 S.Ct. 855 (1997), in which the Court had struck down a floating buffer zone imposed by an injunction. In light of the Sabelko opinion this office issued a Memorandum of Law (ML 97-19) concluding that the City's floating buffer zone ordinance, which is virtually identical to the Phoenix ordinance, would likely be found unconstitutional for the reasons relied upon by the Ninth Circuit in Sabelko.

Immediately after the Ninth Circuit issued its opinion in Sabelko, we received requests from Mayor Golding, Deputy Mayor Warden, and Councilmembers Stallings and Vargas, asking our office to analyze whether the City's own floating buffer zone ordinance would continue to be effective in light of the decision. Referring specifically to our Memorandum of Law, Mayor Golding asked us to prepare an ordinance that would constitutionally implement the same type of protections currently provided by the floating buffer zone ordinance. Attached to this Report is a proposed ordinance that would establish a fixed buffer zone designed to protect all persons' constitutional rights within a specified distance from an entrance to a health care facility, place of worship, or school grounds. We have left the precise distance for you to determine as a matter of policy, but we suggest two alternatives--eight (8) feet and fifteen (15) feet--which have been involved in the prevailing cases on this issue.

Our research leads us to believe that a reasonable fixed buffer zone would probably be held constitutional by the courts. The Schenck case involved a fixed as well as a floating buffer zone, and the Court upheld the fixed zone. Although the Schenck case involved an *injunction* granted on the basis of specific facts and relating to specific locations, we believe that the

underlying constitutional principles relied on by the Court in upholding the fixed buffer zone would apply to an *ordinance* as well. As our earlier Memorandum of Law explained, three elements must be found in order for a regulation on the exercise of constitutionally-protected speech to be constitutional: (1) the regulation must be content-neutral, (2) significant governmental interests must be present in the situation being addressed, and (3) the regulation must be narrowly tailored to burden no more speech than is necessary to protect the governmental interests involved. The courts in both Schenck and Sabelko found that the floating buffer zones met the first two elements.

The courts found the third element was not met because the floating zone created too much uncertainty for the persons engaged in First Amendment activity. Because the zone floated, it was too difficult for a protester at any given moment to know whether he or she was in one or more floating zones surrounding persons entering and leaving the facilities. This constantly moving zone thus created the "substantial risk that more speech would be burdened than the injunction prohibited." 97 D.A.R. at 8991.

The fixed buffer zone in the proposed ordinance, like the fixed zone in the Schenck injunction, does not present the uncertainty that troubled the Supreme Court and the Ninth Circuit. Its size and restricted application allow all persons engaged in any constitutionally-protected activity to determine exactly where the zone of protection can be invoked.

The distance must be sufficiently short that a court would find the persons engaged in First Amendment speech are not effectively prevented from communicating. We suggest alternatives of eight or fifteen feet; eight feet is the size of the floating buffer zone in the City's existing ordinance and in the Phoenix ordinance. The fixed buffer zone in Schenck, however, was fifteen feet. The Schenck Court noted that fifteen feet was a "normal conversational distance," thus supporting the idea that fifteen feet is sufficient to convey a message. No court, however, has analyzed whether the Constitution requires one distance or the other, so choosing a distance for the City's ordinance is a policy decision for you to make.

We have spoken to the city attorneys in Phoenix and Santa Barbara. The Phoenix city attorneys are still weighing their options and may attempt to craft a fixed buffer zone ordinance as well. Santa Barbara's floating buffer zone ordinance also faced a legal challenge, and along with the Phoenix ordinance was pending before the U.S. Supreme Court when the Court handed down its decision in Schenck. Following that decision, the Court remanded both cases back to the Ninth Circuit for reconsideration and decision consistent with Schenck. The Sabelko decision followed; Santa Barbara's attorneys are hoping for a different decision from their panel.

As we stated in our Memorandum of Law, we do not believe that we can structure a floating buffer zone that the Ninth Circuit and the Supreme Court would find constitutional. We look forward to your direction concerning the attached draft ordinance, and to working with you on any other measures you want to discuss.

Respectfully submitted,

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